IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No.

PETER LICAVOLI
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Peter Licavoli, hereinafter referred to as either "Licavoli" or "the Defendant", by his attorney, Ivan E. Barris, respectfully prays for the issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Cir-

cuit, hereinafter sometimes referred to as the Court of Appeals, affirming the Judgment and Sentence rendered by the United States District Court for the District of Columbia, hereinafter sometimes referred to as the Lower Court.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at — F. 2d — (1961).[1]

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit, review of which is herein sought, was entered on February 16, 1961. The Petition for Rehearing En Banc was denied by an Order entered and filed on March 14, 1961.

Jurisdiction of this Honorable Court is invoked under §1254 of Title 28 U. S. C. A., the pertinent provisions of which read:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) • • •;
>
> "(3) • • •."

[1] As of the time of the printing of this Petition for Writ of Certiorari, the Opinion of the United States Court of Appeals for the District of Columbia Circuit was not published.

QUESTIONS PRESENTED

I. Did the Lower Court commit reversible error when it not only refused to give defense requested instructions to the effect that the jurors, in determining whether the Defendant's failure to appear and to testify was wilful, might properly take into consideration evidence which tended to indicate that the Defendant's default was due to his reliance upon advice of counsel, but to the contrary, instructed the jury that such reliance was, as a matter of law, no defense to the offense charged?

II. Where the Defendant was charged with wilfully failing and refusing to appear and to give testimony before the Senate Select Committee on Improper Activities in the Labor or Management Field on July 31, 1958 and the evidence adduced by the Government unequivocally demonstrated that the subpoena served upon the Defendant in Detroit, Michigan, in the morning of July 28, 1958, required the Defendant's attendance for the purpose of testifying, not on July 31, 1958, but rather "forthwith", (viz., July 29, 1958, when the Senate Select Committee was not even in session), did the Lower Court err when it denied the Defendant's Motion for a Judgment of Acquittal which was made at the conclusion of the Government's case in chief and which was renewed at the close of all the proofs?

III. Did the Lower Court err when, over the timely objection of defense counsel, it allowed the Assistant United States Attorney to pursue, upon cross-examination of a defense witness, a line of questioning which manifestly prejudiced and inflamed the jury against the Defendant?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

2 U. S. C. §192, R. S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Section 269 of the Judicial Code, as amended (28 U. S. C. §391) provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

"HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT OF THE CASE

(Unless otherwise clearly shown by the context, figures in parentheses refer to corresponding pages of the Joint Appendix heretofore filed with the United States Court of Appeals for the District of Columbia Circuit.)

Peter Licavoli, having been indicted for an alleged violation of 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended (J. A. 3), was found guilty thereof on March 30, 1960, by a jury in the United States District Court for the District of Columbia (J. A. 2, 118).[2] On April 14, 1960, he was sentenced by the Honorable Alexander Holtzoff, Judge of the United States District Court for the District of Columbia, to be imprisoned in an institution to be designated by the Attorney General of the United States for a term of six (6) months and to pay a committed fine of One Thousand Dollars ($1,000.00), with the imprisonment to commence at the expiration of the sentence imposed upon Licavoli by the United States District Court

[2] The Lower Court acquired jurisdiction over the instant cause by virtue of the provisions of 18 U. S. C., §3231.

for the Eastern District of Michigan in Docket Number 35636 (J. A. 2, 119). Notice of Appeal from the Judgment and Sentence was filed on April 22, 1960, in the United States District Court for the District of Columbia (J. A. 2, 122).

On February 16, 1961 the United States Court of Appeals for the District of Columbia Circuit affirmed the Judgment and Sentence of the Lower Court. Copies of the Opinion and of the Judgment of the Court of Appeals are annexed hereto, respectively, as Appendix A and Appendix B. On March 14, 1961 the Court of Appeals entered its Order denying a Petition for Rehearing En Banc.

In the language of the True Bill, Licavoli was charged as follows:

> "On July 31, 1958, in the District of Columbia, the Senate Select Committee on Improper Activities in the Labor or Management Field, of the United States Senate, was conducting hearings, pursuant to Senate Resolutions 74, 88 and 221 of the 85th Congress.
>
> Defendant, Peter Licavoli, having been duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Committee, to appear and to give testimony before that Committee in the District of Columbia on July 31, 1958, upon a matter under inquiry before that Committee, did, in the District of Columbia, on the said July 31, 1958, unlawfully fail and refuse so to appear, and thereby wilfully did make default." (J. A. 3.)

Edward M. Jones, called as a witness by the United States of America, hereinafter referred to as the "Government", testified that in the morning of July 28, 1958, he served a subpoena, a copy of which was received into evi-

dence as Government Exhibit #5 (J. A. 11, 123), upon Licavoli in the Post Office Building (also known as the Federal Building), in the City of Detroit, Michigan (J. A. 11). Upon approaching Licavoli, Mr. Jones said "I have a subpoena for you" and at the same time he placed the subpoena under Licavoli's arm (J. A. 11, 12). As Mr. Jones was serving the subpoena upon Licavoli, Mr. Joseph Louisell, in a loud and clear voice, stated "Don't take that; don't take that" (J. A. 12). Mr. Louisell also told Mr. Jones "You have no right to serve it here" (J. A. 12).

Government Exhibit #5 reads as follows:

"UNITED STATES OF AMERICA
Congress of the United States

To: Peter Licavoli
Detroit, Michigan, Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Select Committee on Improper Activities in the Labor or Management Field of the Senate of the United States, on forthwith, 195—, at — o'clock — m., at their committee room 101 Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To.....to serve and return.

Given under my hand, by order of the committee, this 25th day of July, in the year of our Lord one thousand nine hundred and fifty-eight.

sgd/ John L. McClellan
Chairman, Senate Select Committee
on Improper Activities in the Labor or Management Field.

It is requested that you telephonically contact Mr. Robert F. Kennedy at Washington, D. C., CApitol 4-3121, ext. 4828, for further instructions. (J. A. 123.)"

Pierre Salinger, called as a witness by the Government, testified that in his capacity as an investigator for the Senate Select Committee, he was in Detroit, Michigan, on July 28, 1958 (J. A. 17, 18). After he had been informed that a subpoena had earlier been served upon Licavoli on July 28, 1958, Salinger telephoned Mr. Joseph Louisell at the latter's law office in Detroit, Michigan, in the early afternoon of the same day (J. A. 17, 18, 32). During the telephone conversation which ensued, Mr. Louisell informed Mr. Salinger that he, Mr. Louisell, considered the subpoena invalid because it had been served in the Federal Court House (J. A. 19, 32, 36, 94). Mr. Louisell further stated that he was going to advise his client not to respond to the subpoena, but Mr. Louisell added that, although he was then representing Licavoli in another matter, he was not even sure that he would represent Licavoli with respect to the hearing in Washington (J. A. 19, 20, 31). Mr. Salinger, stating that he was acting upon instructions from Washington, then asked Mr. Louisell to convey to his client the message that, while the subpoena read "forthwith," that requirement had been waived and thus could be ignored by Mr. Licavoli, provided that Licavoli would appear to testify in Washington on July 31, 1958 at 9:00 in the forenoon thereof (J. A. 20, 22, 31, 32, 93, 95). Mr. Louisell replied that he did not know whether or not he would convey this message to his client (J. A. 21).

At approximately 7:00 in the evening of July 28, 1958, Mr. Salinger again called Mr. Louisell and stated that since he, Salinger, had been advised by his office in Washington that the service of the subpoena was valid, he was

again requesting that Licavoli appear in Washington on July 31, 1958 (J. A. 21, 22, 32, 33, 51). Mr. Louisell responded that he still considered the subpoena to be invalid and he again stated, when requested by Mr. Salinger to convey this message to his client, that he might or might not do so (J. A. 22, 33) and he also reiterated that he was not sure he was going to represent Mr. Licavoli (J. A. 33).

During the morning of July 29, 1958, Mr. Salinger drafted and caused to be sent, in duplicate, a certain telegram, a copy of which was received into evidence as Government Exhibit #6 and which reads as follows (J. A. 24, 25, 26):

"Peter Licavoli
1154 Balfour
Grosse Pointe, Michigan

Peter Licavoli
Grace Range, Route 2
Box 940
Tucson, Arizona

'Following up our conversation with your attorney, Mr. Louisell and pursuant to subpoena served upon you, you are hereby notified to appear in Room 101, Senate Office Building, Washington, D. C., at 9:00 a.m., Thursday, July 31, 1958.

'Robert F. Kennedy, Chief Counsel
'Senate Select Committee on
Improper Activities in the Labor or
Management Field' (J. A. 124)."

On the same day, July 29, 1958, Mr. Salinger received a telegram from the Western Union, a photostatic copy of which was received into evidence as Government Exhibit #7 and which reads as follows (J. A. 27):

" 'Detroit, Michigan, July 29.

" 'Robert F. Kennedy, Chief Counsel, Senate Select Committee on Improper Activities in the Labor or Management Field. Detroit.

'Your telegram July 29 to Peter Licavoli, 1154 Balfour, Grosse Pointe, Michigan, is undelivered. Addressee refused to accept.

'Western Union.' (J. A. 124.)"

On July 31, 1958, when the Senate Select Committee reconvened after having been in recess due to the death of Senator McClellan's son (J. A. 50),[3] Licavoli was called as a witness, but did not respond to his name and did not physically manifest himself (J. A. 28, 29, 30).

At the conclusion of the Government's case-in-chief, counsel for Licavoli made a Motion for a Judgment of Acquittal (J. A. 56-63). After this motion was denied (J. A. 66-69), two witnesses were called on behalf of Licavoli, namely, Grace Licavoli, the wife of the Defendant, who testified that when a Western Union messenger arrived at the Licavoli home in Grosse Pointe, Michigan, on July 29, 1958, to deliver a telegram from Washington, she informed the messenger that her husband was not at home (J. A. 69, 70), and Mr. Louisell (J. A. 71-92).

Mr. Louisell, an attorney practicing law in the City of Detroit, State of Michigan (J. A. 71), testified in pertinent portions, as follows:

He was present on July 28, 1958, when a process server tendered a subpoena to Licavoli (J. A. 71, 89). At that

[3] The Senate Select Committee was in recess from July 18 to July 31, 1958 (see Part 34, Hearings before the Select Committee on Improper Activities in the Labor or Management Field) (United States Government Printing Office (1958)).

time, Mr. Louisell told the process server that he did not believe that the process was good process and he also discussed with Licavoli the reasons why he believed that the service of the subpoena was invalid (J. A. 71, 89, 91, 92). His reasons for this belief were the manner in which the subpoena had been served and the vagueness of the language of the subpoena (J. A. 89).

Later in the same day, at approximately 1:00 in the afternoon, Mr. Louisell received a call from Mr. Salinger, who, after identifying himself, inquired as to whether Mr. Louisell had called Washington in connection with the subpoena (J. A. 72). When Mr. Louisell replied in the negative, Mr. Salinger inquired as to whether Mr. Licavoli had left for Washington, and Mr. Louisell replied that, to his best knowledge, Mr. Licavoli had not left for Washington (J. A. 72). Mr. Louisell also told Mr. Salinger that he, Louisell, did not believe that the subpoena was good (J. A. 72).

Mr. Salinger then stated that the "forthwith" provisions of the subpoena were being waived, but that it was desired that Licavoli be present in Washington on the morning of July 31, 1958, for the purpose of being interviewed to determine if there was anything pertinent or any information which Licavoli might have that could be presented to the McClellan committee (J. A. 72). When Mr. Salinger inquired as to whether Mr. Louisell would see to it that Licavoli appeared in the investigating room on July 31, 1958,* Mr. Louisell responded that he "had no authority to commit Mr. Licavoli to such a request" (J. A. 72).

At approximately 7:00 p.m. of the same day, Mr. Louisell received a second telephone call from Mr. Salinger,

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*On rebuttal, Mr. Salinger denied making such a statement to Mr. Louisell (J. A. 93).

who stated that he had received instructions from Washington to change the language of the subpoena which had earlier been served upon Licavoli in two respects, namely, the "forthwith" provision was to be changed to July 31, 1958 and Room 101, the investigating room, was to be changed to the Caucus Room[4] [see footnote 4 at bottom of p. 11 herein] (J. A. 73). When Mr. Salinger urged Mr. Louisell to tell Mr. Licavoli that he had to be in Washington on July 31, 1958, Mr. Louisell told Mr. Salinger that he would not so inform Mr. Licavoli inasmuch as Mr. Salinger had earlier waived the "forthwith" provisions of the subpoena (J. A. 73).

After receiving the first telephone call from Mr. Salinger, Mr. Louisell contacted Mr. Licavoli's office by telephone, and, when informed that Mr. Licavoli was not present, Mr. Louisell left word with Mr. Licavoli's secretary to the effect that Mr. Licavoli was not to go to Washington forthwith, but rather, was to contact Mr. Lousell (J. A. 73). On July 29, 1958, while at his office, Mr. Louisell received a telephone call from Mr. Licavoli in which Mr. Licavoli acknowledged that he had received the message left the day before by Mr. Louisell (J. A. 74). Mr. Louisell then explained to Mr. Licavoli that since Mr. Salinger had waived Licavoli's forthwith appearance in Washington, he was under no obligation to appear forthwith in Washington (J. A. 74). Mr. Louisell further told Mr. Licavoli that Mr. Salinger had asked him to request Mr. Licavoli's presence in Washington in the investigator's room in the morning of July 31, 1958 and that he had told Mr. Salinger that he would not order Mr. Licavoli to appear inasmuch as, in his judgment, Mr. Licavoli did not have to appear unless he chose to do so voluntarily (J. A. 74). Mr. Licavoli inquired of Mr. Louisell "Are you sure I don't have to go?" and, "Am I under no legal obligation to go?" (J. A.

74). To these queries Mr. Louisell responded "I am confident that you don't have to go, you are under no legal obligation to go, but just to be doubly sure, I'll check some law" (J. A. 74). Later the same day, after having had an opportunity to familiarize himself with the applicable law, Mr. Louisell, in a second conversation with Mr. Licavoli on July 29, 1958, told the latter that his earlier judgment to the effect that Licavoli was under no legal obligation to appear in Washington was supported by cases that he had read and then Mr. Louisell again advised Mr. Licavoli that he was under no legal obligation to appear (J. A. 74, 75, 90). During both conversations that Mr. Louisell had with Mr. Licavoli on July 29, 1958, Mr. Licavoli indicated that he was perfectly willing to go to the committee and to testify if he was under a legal obligation to do so (J. A. 75).

After Mr. Louisell had read something in the newspapers to the effect that the Senate committee had voted to recommend to the Senate that Mr. Licavoli be cited for contempt, Mr. Licavoli, who had also read the same newspaper article, contacted Mr. Louisell around August 1, 1958 and asked "What have you done to me, you've gotten me into trouble" (J. A. 75). To this Mr. Louisell responded by stating that he did not believe that Mr. Licavoli was in any trouble, as he, Louisell, was completely satisfied that Mr. Licavoli was not under any legal compulsion to go (J. A. 75). Thereupon, Mr. Licavoli told Mr. Louisell "Well, I don't want any trouble or difficulty on the subject at all. Will you get in touch with them in Washington and tell them I am perfectly willing to come in and appear before the committee" (J. A. 75).

After unsuccessfully attempting, on August 4, 5 and 6, to reach Mr. Tierney, an attorney for the Committee, or

any other representative of the Committee, by telephone, to advise that Mr. Licavoli was perfectly willing to appear before the Committee, Mr. Louisell finally did speak to Mr. Tierney by telephone on August 7 (J. A. 76, 77). During the ensuing conversation Mr. Louisell informed Mr. Tierney that Mr. Licavoli had instructed him, Louisell, to request that he be allowed to appear before the Committee on any date upon the giving of reasonable notice (J. A. 77). When Mr. Tierney failed the following day to report back to Mr. Louisell after taking the matter up with the Committee, Mr. Louisell attempted, but without success, to reach Mr. Tierney by telephone (J. A. 77). Mr. Louisell then succeeded in reaching another attorney for the Committee, Mr. Alderman, to whom it was again represented that Mr. Licavoli was willing at any time upon reasonable notice to come and to appear before the Committee (J. A. 77). Despite his representation to Mr. Louisell that he would take the matter up with the Committee and then report back to Mr. Louisell, counsel for the Committee, to whom Mr. Louisell had spoken, did not thereafter contact Mr. Louisell (J. A. 77, 79).

On August 9, 1958 Mr. Louisell sent defendant's Exhibit 1 to the Committee (J. A. 79, 80). Defendant's Exhibit 1 (J. A. 125), reads as follows:

"Hon. John L. McClellan, Chairman
Senate Select Committee Labor-Managament
Affairs

Senate Office Building
Washington, D. C.

Peter Licavoli by his attorney confirms oral undertaking to Committee representatives Tierney and Alderman of August 7 and 8 respectively to appear before your committee on reasonable notice.

Peter Licavoli by
Joseph W. Louisell, Attorney
2366 Penobscot Building
Detroit 26, Michigan"

Defendant's Exhibit 2 (J. A. 125) was, in turn, received by Mr. Louisell (J. A. 80, 81). Defendant's Exhibit 2 reads as follows:

"WESTERN UNION TELEGRAM

DEB568 PA479 (Duplicate of Telephoned Telegram)
1958 Aug 11 PM 6 47

P WYP 184 GOFT PD-SN
Washington DC 11 512 PME

Joseph W. Louisell, Attorney
Penobscot Bldg Det

Reurtel August 9 Mr Licavoli has information we believe to be pertinent to the subject matter under inquiry at the time he was subpoenaed to appear before the committee. He chose to disobey the committee's subpoena, refused to appear, did not appear, and the committee voted to cite him for contempt. The resolution of contempt is now on the Senate calendar. If Mr. Licavoli wishes now to appear voluntarily and testify, and so requests that he be permitted to do so the committee will consider same and advise you.

John L. McClellan, Chairman."

A reply telegram was sent to the Committee on August 12, 1958 (J. A. 81, 82). This telegram, defendant's Exhibit 3 (J. A. 126), reads as follows:

"August 12, 1958
2:00 P.M.

WESTERN UNION TELEGRAM

Hon. John L. McClellan, Chairman
Senate Select Committee Labor-Management
Affairs

Senate Office Building
Washington, D. C.

Reurtel August 11 Mr. Licavoli respectfully disputes the validity of subpoena tendered but if voluntary appearance would avoid contest of contempt proceedings he would appear. Without knowledge as to nature of questions can not speculate as to what his testimony would be but would be the same irrespective of date of appearance, Subject to foregoing he respectfully requests appointment with Committee.

Joseph W. Louisell."

Again, in turn, defendant's Exhibit 4 was received by Mr. Louisell from the Committee (J. A. 82). Defendant's Exhibit 4 (J. A. 126) reads as follows:

"WESTERN UNION TELEGRAM

DE264 PA 237 1958 Aug 15 AM 11 53 (30)
P WYJO16 Govt PD-SN

Washington DC 15 1114 AME-

Joseph W. Louisell
2366 Penobscot Bldg Report Delivery ADet-

Reurtel August 12. As I previously wired you, in the event Mr. Licavoli desires to appear before the committee kindly advise me and the matter will be presented to the committee for its consideration.

John L. McClellan Chairman
Select Committee on Improper
Activities in the Labor or
Management Field."

The last communication between Mr. Louisell and the Committee was a letter written on August 18, 1958 by the former to the latter (J. A. 83, 84). This letter, defendant's Exhibit 5 (J. A. 127), reads as follows:

"August 18, 1958

Hon. John L. McClellan, Chairman
Select Committee on Improper Activities
in the Labor or Management Field
Senate Office Building
Washington, D. C.

Re: Peter Licavoli

Dear Mr. McClellan:

Your telegram of August 15, 1958 was received during my absence from the office. Apparently my telegram to you of August 12, 1958 was misleading, and I think it perhaps best that I attempt to clarify the situation as to Mr. Licavoli's position in this matter.

On receipt of your telegram of August 11, I consulted with Mr. Licavoli and advised him that it was my considered legal opinion that a contempt citation predicated upon the subpoena handed him on July 28, 1958 could not succeed. I further explained to Mr. Licavoli that nonetheless, and especially in view of his present difficulties, if it were possible for him to avoid contesting a contempt citation by a voluntary appearance before the Committee, it would be my advice that he appear. Moreover, it was not my disposition to encourage him otherwise than to appear and be of such aid to the Committee as circumstances permitted. Mr. Licavoli concurred in my recommendation in the matter and my telegram of August 12 went forward.

It was my intent, in that telegram, to make clear that Mr. Licavoli would appear voluntarily, upon

reasonable notice given to me as his attorney, provided such voluntary appearance would preclude contempt proceedings predicated upon the subpoena handed Mr. Licavoli July 28.

If, in the light of the foregoing, the Committee desires Mr. Licavoli to appear before it, I will arrange for him to appear upon receipt of your advice that such appearance will stand in lieu and in place of the appearance suggested by the subpoena delivered July 28.

Very respectfully yours,

JWL:JH /s/ Joseph W. Louisell."

The Motion for a Judgment of Acquittal was renewed at the close of all of the proofs and again denied (J. A. 97).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Honorable Court, namely, whether a good faith reliance upon advice of counsel constitutes a defense to the offense of failing to appear and to testify, as proscribed by 2 U. S. C. §192, R. S. 102 (52) Stat. 942. In arriving at a negative (and, as amplified in Argument I, *infra*, an erroneous) answer to this question, the Court of Appeals not only implicitly declined to adopt the express pronouncement of this Honorable Court in *United States v. Murdock*, 54 S. Ct. 223, 290 U. S. 389 to the effect that while the offense of failing to appear and to testify (wilful default) contains, as an element, "wilfulness", the same is not true of the other separate and distinct offense (refusal to answer pertinent questions) proscribed by 2

U. S. C., §192, R. S. 102 (52 Stat. 942), but also misconceived the rationale of *Quinn v. United States*, 75 S. Ct. 668, 349 U. S. 155 to mean that the offense of refusal to answer pertinent questions includes a specific intent, whereas this Honorable Court actually determined in *Quinn v. United States, supra*, that the Government need only establish a general criminal intent *(mens rea)* in order to sustain a conviction for the offense of refusal to answer pertinent questions.

Furthermore, the Court of Appeals, sustained the conviction notwithstanding, as amplified in Argument II, *infra*, the evidence adduced by the Government unequivocally demonstrated beyond peradventure that the Defendant was not, and could not, be guilty of the offense charged and, notwithstanding, as amplified in Argument III, *infra*, the conviction resulted from a deliberate and calculated effort by the Assistant United States Attorney to prejudice and to inflame the jury against the Defendant by pursuing a patently improper line of questioning in the course of his cross-examination of the Defendant's chief witness.

ARGUMENT

I.

THE LOWER COURT COMMITTED REVERSIBLE ERROR WHEN IT NOT ONLY REFUSED TO GIVE DEFENSE REQUESTED INSTRUCTIONS TO THE EFFECT THAT THE JURORS, IN DETERMINING WHETHER THE DEFENDANT'S FAILURE TO APPEAR AND TO TESTIFY WAS WILFUL, MIGHT PROPERLY TAKE INTO CONSIDERATION EVIDENCE WHICH TENDED TO INDICATE THAT THE DEFENDANT'S DEFAULT WAS DUE TO HIS RELIANCE UPON ADVICE OF COUNSEL, BUT TO THE CONTRARY, INSTRUCTED THE JURY THAT SUCH RELIANCE WAS, AS A MATTER OF LAW, NO DEFENSE TO THE OFFENSE CHARGED.

It was the theory of the defense that the Defendant's failure to appear and testify before the Senate Select Committee did not constitute the "wilful" default contemplated by 2 U. S. C. §192, R. S. 102 (52 Stat. 942), as amended, because it resulted from the Defendant's reliance upon the advice of counsel that he was under no legal duty to so appear and to so testify.[5] In support of this theory there was adduced from Mr. Joseph Louisell, an attorney, testimony which is hereinafter summarized:

1. At the time the subpoena (Govt. Exhibit #5, J. A. 123) was served on July 28, 1958, upon the Defendant, Mr. Louisell voiced the opinion to the Defendant that the subpoena was invalid (J. A. 91).

2. On two occasions the following day, one of which was after he had an opportunity to refer to the applicable

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[5] Defense counsel in his closing argument leaned heavily upon this theme (J. A. 105-109).

law, and in accordance with views earlier expressed to both the process server (J. A. 71, 89, 90, 91, 92) and on two occasions to Mr. Salinger (J. A. 72, 73), Mr. Louisell assured the Defendant that he was under no legal obligation to obey the subpoena (J. A. 74, 75, 90).

3. During both of the conversations held between Mr. Louisell and the Defendant on July 29, 1958, the latter informed the former that he was perfectly willing to testify before the Senate Select Committee if he was under a legal obligation to do so (J. A. 75).

4. After the Defendant learned that he was about to be cited for contempt by the Senate Select Committee, the Defendant contacted Mr. Louisell and after observing "What have you done to me, you've gotten me into trouble", he asked Mr. Louisell to get in touch with Washington for the purpose of informing the Committee that he was perfectly willing to appear (J. A. 75).

5. Thereafter, in accordance with his client's instructions, Mr. Louisell communicated by telephone, telegram and letter with the Committee in an effort to arrange for Mr. Licavoli's appearance before the Committee (J. A. 76, 77, 79, 80, 81, 82, 83, 84, 125, 126, 127).

A. WHEN TIMELY REQUESTED BY DEFENSE COUNSEL AND WHERE JUSTIFIED BY THE ISSUES AND EVIDENCE, INSTRUCTIONS AS TO THE DEFENDANT'S THEORY OF DEFENSE MUST BE GIVEN BY THE LOWER COURT TO THE JURY.

It is a well recognized principle of criminal jurisprudence that if the Defendant's theory of defense is both legally tenable and supported by some evidence, the Lower Court, particularly where timely requested to do so by defense counsel, must instruct the jury upon the theory of defense

(*Levine v. United States*, 261 F. 2d 747, 104 U. S. App. D. C. 281; *Obery v. United States*, 217 F. 2d 860, 95 U. S. App. D. C. 28; *McAffee v. United States*, 105 F. 2d 21, 70 App. D. C. 142; *Meadows v. United States*, 82 F. 2d 881, 65 App. D. C. 275; *United States v. O'Connor*, 237 F. 2d 466 (C. C. A. 2); *Apel v. United States*, 247 F. 2d 277 (C. C. A. 8); *United States v. Blount*, 229 F. 2d 669 (C. C. A. 2); *Smith v. United States*, 230 F. 2d 935 (C. C. A. 6)). However, in the case at bar, the Lower Court, nothwithstanding there was ample foundation in the evidence to warrant the giving of defense requested instructions as to the theory of defense,* not only did not give the following defense requested instructions (J. A. 100).

"'*Defense Instruction No. 7*

You are instructed that, if you find that the Defendant in good faith sought the advice of counsel as to what he might lawfully do and honestly followed such advice, relying upon it and believing it to be correct, then you are instructed that you must acquit the Defendant. (*Townsend v. United States*, 95 F. 2d 352; *Spirt v. Bechtel*, 232 F. 2d 241, 255.)

Defense Instruction No. 8

You are instructed that where, as in this case, wilful intent is an element of the offense, the good faith reliance on the erroneous advice of counsel, to whom the Defendant has revealed all of the pertinent facts, does constitute a valid defense. In the instant case, you are instructed that, if you find that the Defendant relied in good faith on the advice of counsel in failing to appear before the Committee after he had revealed all pertinent facts to the coun-

* The above summarization of the testimony of Mr. Louisell patently belies the Lower Court's statement: "—and there is no proof to what extent it [advice of counsel] was believed or relied on" (J. A. 117).

sel, then you must find the Defendant not guilty. (*Spirt v. Bechtel*, 232 F. 2d 241, 255.) (J. A. 120, 121.)"

but he then proceeded to compound the error by affirmatively instructing the jury to the effect that reliance upon the advice of counsel was *not* a defense:

"A member of the bar, Mr. Louisell, was called as a witness in behalf of the Defendant, and he testified that he looked up the law, or thought he did, and advised the Defendant that the subpoena was void, that it was not properly served, and that he, the defendant, did not have to obey it.

If such advice was given, the advice was wrong, as a matter of law, and I so instruct you. Even if this advice was given, and even if it was believed, and relied upon,—and there is no proof to what extent it was believed or relied upon—I instruct you, as a matter of law, that it is no defense. It is no defense to a criminal prosecution for the defendant to say, 'My lawyer advised me that I could do this.' A mistaken view of the law does not excuse the defendant and is no defense. And even if the defendant acted on the advice of counsel, his action may still be regarded as wilful if what he did was intentional and deliberate on his part." (J. A. 116, 117).[7]

[7] Timely exception to this instruction was taken by defense counsel (J. A. 118).

B. WHILE, GENERALLY, RELIANCE UPON ADIVICE OF COUNSEL IS NOT A DEFENSE, THE CONTRARY IS TRUE WHERE THE OFFENSE CHARGED, AS HERE, REQUIRES SPECIFIC INTENT, THIS EXCEPTION BEING PREDICATED UPON THE LEGAL THEORY THAT SAID RELIANCE UPON ADVICE OF COUNSEL CONSTITUTES JUSTIFICATION AND THUS NEGATES THE REQUISITE ELEMENT OF INTENT.

1. Unlike the other offense delineated by 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended, (refusal to answer pertinent questions)) the offense herein alleged, wilful default, requires a specific intent.

That 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended, insofar as the offense of failing to appear and to testify (wilful default) is concerned, delineates, as an element of the offense, that peculiar type of specific intent which is characterized by the term "wilfully" was decided by this Honorable Court in *United States v. Murdock, supra.* This Honorable Court further determined, in the language hereinafter quoted, that while the offense of wilful default contains "wilfulness" as an element, the same is not true of the offense of refusal to answer pertinent questions, another separate and distinct offense proscribed by 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended:

> "The government relies on *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268, 73 L. Ed. 692. That case, however, construed an altogether different statutory provision.' Sinclair was indicted for refusal to answer a question pertinent to a matter under investigation by a committee of the Senate. The act upon which the indictment was based declared 'Every person who having been summoned as a witness by the authority of either House of Con-

gress, to give testimony or produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor.'

Two distinct offenses are described in the disjunctive, and in only one of them is wilfulness an element.[8] Sinclair, having been summoned, attended the hearing. He was therefore guilty of no wilful default in obeying a summons. He refused to answer certain questions, not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong, he took the risk of becoming liable to the prescribed penalty." (Emphasis supplied.)

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[8] Unquestionably, the Lower Court's refusal to instruct the jury that reliance upon advice of counsel was a defense resulted from its failure, like the failure of Government counsel in the *Murdock* case, *supra*, to appreciate that the offense herein charged was not the same offense involved in *Sinclair v. United States*, *supra*, but rather, was a separate and distinct offense, a necessary element of which is wilfulness (J. A. 99). The Court of Appeals, in turn, while recognizing that two offenses are defined by 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended, (see Appendix A to this petition for Writ of Certiorari, Opinion of the Court of Appeals, pages 47, 48, 49), declined to accept the conclusion reached by this Honorable Court in *United States v. Murdock*, *supra*, that wilfulness is not an element common to both the offenses defined by 2 U. S. C., §192, R. S. 102 (52 Stat. 942) (See Appendix A to this Petition for Writ of Certiorari, Opinion of the Court of Appeals, pages 47, 49-51). Instead, the Court of Appeals, by misconceiving the rationale of *Quinn v. United States*, *supra*, to mean that the offense of refusal to answer pertinent

(Continued on next page)

2. Reliance upon the advice of counsel is a defense to a prosecution for violation of an offense which requires a specific intent.

This Honorable Court has heretofore placed its judicial stamp of approval upon the doctrine that reliance upon advice of counsel, even if such advice is erroneous, is a defense to an offense wherein specific intent is an element (*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425).[9] In fact, the pronouncement of this Honorable Court with respect to advice of counsel being a defense where the offense requires a specific intent was adopted by the Court of Appeals in *Townsend v. United States*, 95 F. 2d 352, 68 App. D. C. 223,[10] where the Defendant, as is the case

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(Continued from preceding page)

questions includes a specific intent (whereas a perusal of the *Quinn* opinion indicates that this Honorable Court merely indicated that the Government need only establish a general criminal intent *(mens rea)* in order to sustain a conviction for the offense of refusal to answer pertinent questions), determined that wilfulness was a common element, from which the Court of Appeals deduced that since under the holding of *Sinclair v. United States, supra*, advice of counsel was no defense to the offense of refusal to answer pertinent questions, it likewise was no defense to the offense herein charged. Necessarily and logically, the ultimate conclusion reached by the Court of Appeals was as fallacious as the major false premise upon which it was predicated.

[9] For other cases which hold that ignorance of the law and/or reliance upon erroneous advice of counsel is a defense to an offense which requires wilful intent, see *United States v. Murdock, supra; Yarborough v. United States*, 230 F. 2d 56 (C. C. A. 4); *United States v. One Buick Coach Automobile*, 34 F. 2d 318 (D. C. N. D. Ind.); *United States v. DiSilvestro*, 147 F. Supp. 300 (D. C. E. D. Pa.); *Spirt v. Bechtel*, 237 F. 2d 241 (C. C. A. 2) (dissenting opinion).

[10] Nowhere to be found in the Opinion of the Court of Appeals (see Appendix A to this Petition for Writ of Certiorari, pages 47-51) is any mention of *Townsend v. United States, supra*, notwithstanding the Defendant placed heavy reliance upon its *dicta* in his Brief filed with the Court of Appeals.

here, was charged with a wilful default and not with the offense of failure to answer pertinent questions.

In the *Townsend* case, *supra*, the Court of Appeals, while rejecting the proposition that the term "wilfully" as contained in 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended, connoted "evil or bad purpose"[11] (95 F. 2d 358), nonetheless clearly and unmistakably concluded that reliance upon advice of counsel was a defense to the *very* charge herein involved, namely, wilful default. In this respect, the Court of Appeals stated at pages 358 and 359 of the *Townsend* case, *supra*, as follows:

> "On the other hand, the general rule in criminal cases is that a mistake of law upon the part of the accused does not constitute justification for his act; that, if he deliberately and intentionally commits the prohibited act, it is criminal, regardless of his belief that his act was lawful; except in cases where ignorance of the law may disprove the existence of a required specific intent. (Citing cases.) This is true even though the motive of the accused may be of the highest, as in the case of one who believes that his act is part of his professed religion. *Rey-*

[11] Notwithstanding the assertion to the contrary found in the Opinion of the Court of Appeals (see Appendix A to this Petition for Writ of Certiorari, page 48), the Defendant has *never* espoused, and does not now espouse, the theory that the term "wilfully", as it appears in 2 U. S. C., §192, R. S. 102 (52 Stat. 942) connotes "evil or bad purpose". What the Defendant does contend is that while the term "wilfully", as contained in 2 U. S. C., §192, R. S. 102 (52 Stat. 942), is not equatable to an "evil or bad purpose", it nonetheless connotes, as was recognized by the Court of Appeals in *Townsend v. United States*, *supra*, a specie of specific intent, and that as was recognized by this Honorable Court with respect to another offense in *Williamson v. United States*, *supra*, and by the Court of Appeals with respect to the very offense herein involved, a *bona fide* reliance upon advice of counsel is a valid defense to an offense which requires proof of a specific intent, as distinguished from general criminal intent, a state of mind often described by the phrase *mens rea*.

nolds v. United States, 98 U. S. 145, 167, 25 L. Ed. 244. *However, the Supreme Court has also held—perhaps on the theory that wilfulness is a type of specific intent—that where the crime involves wilful intent, an accused may show justification by proving that he 'honestly and in good faith seeks advice of a lawyer as to what he may lawfully do * * * and fully and honestly lays all the facts before his counsel, and in good faith and honesty follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful * * * even if such advice were an inaccurate construction of the law.' Williamson v. United States*, 207 U. S. 425, 453, 28 S. Ct. 163, 173, 52 L. Ed. 278. In *United States v. Murdock, supra*, the Supreme Court has extended this exception to the general rule even farther as applied to the particular facts of that case." (Emphasis supplied.)

While it is readily conceded that the discussion contained in the *Townsend* case, *supra*, pertaining to the defense of reliance upon advice of counsel is *dicta*,[12] the soundness of the legal doctrine therein enunciated cannot be disputed, and it is respectfully submitted that the *dicta* of the *Townsend* case should be the *ratio decidendi* of this case. The failure of the Lower Court to instruct

[12] In the *Townsend* case, *supra*, the findings of guilty were upheld, notwithstanding the fact that the Court of Appeals indicated that reliance upon advice of counsel was a valid defense to the offense of wilful default, for the reason, as stated at page 360 of the Opinion, that "There is nothing in the excluded evidence to indicate that appellant submitted the question of his duty to attend the committee hearings to an attorney and acted honestly upon that advice, relying upon it and believing it to be correct. There is nothing in the excluded evidence to indicate that there was any uncertainty in the mind of the appellant as to the law or to his duty to attend. In other words, there is nothing in the excluded evidence to take the present case out of the general rule regarding mistake of law, or to bring it within the exceptions stated in the *Williamson* and *Murdock* cases. Consequently there was no reason to send the evidence to the jury upon the ground of good faith or honest belief."

the jurors that reliance upon advice of counsel was a defense, coupled with an erroneous instruction to the contrary, effectively deprived the Defendant of his right to have his guilt or innocence determined by the triers of fact, and reduced the instructions, in essence, to nothing more than a direction to the jury to find the Defendant guilty as charged. It is respectfully submitted that this error, which necessarily inhered in the verdict of guilty, should be corrected by this Honorable Court.

ARGUMENT

II.

WHERE THE DEFENDANT WAS CHARGED WITH WILFULLY FAILING AND REFUSING TO APPEAR AND TO GIVE TESTIMONY BEFORE THE SENATE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD ON JULY 31, 1958 AND THE EVIDENCE ADDUCED BY THE GOVERNMENT UNEQUIVOCALLY DEMONSTRATED THAT THE SUBPOENA SERVED UPON THE DEFENDANT IN DETROIT, MICHIGAN, IN THE MORNING OF JULY 28, 1958, REQUIRED THE DEFENDANT'S ATTENDANCE FOR THE PURPOSE OF TESTIFYING, NOT ON JULY 31, 1958, BUT RATHER "FORTHWITH", (VIZ., JULY 29, 1958, WHEN THE SENATE SELECT COMMITTEE WAS NOT EVEN IN SESSION), THE LOWER COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WHICH WAS MADE AT THE CONCLUSION OF THE GOVERNMENT'S CASE IN CHIEF AND WHICH WAS RENEWED AT THE CLOSE OF ALL THE PROOFS.[13]

The Defendant was charged in the following language with an alleged violation of 2 U. S. C., §192, R. S. 102 (52 Stat. 942), as amended:

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[13] Amazingly, the Court of Appeals in its Opinion (Appendix A to this Petition for Writ of Certiorari, pages 47-51) *completely* ignored this unanswerable contention made before the Court of Appeals and herein reiterated.

"On July 31, 1958, in the District of Columbia, the Senate Select Committee on Improper Activities in the Labor or Management Field, of the United States Senate, was conducting hearings, pursuant to Senate Resolutions 74, 88 and 221 of the 85th Congress.

Defendant, Peter Licavoli, having been duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Committee, to appear and to give testimony before that Committee in the District of Columbia on July 31, 1958, upon a matter under inquiry before that Committee, did, in the District of Columbia, on the said July 31, 1958, unlawfully fail and refuse so to appear, and thereby wilfully did make default." (J. A. 3.)

Axiomatically, it was incumbent upon the Government to establish beyond a reasonable doubt each and every element of the offense charged (*Prettyman v. United States*, 180 F. 30 (C. C. A. 6); *Minner v. United States*, 57 F. 2d 506 (C. C. A. 10); *Imholte v. United States*, 226 F. 2d 585 (C. C. A. 8)).

These elements are:

I. That the Defendant was duly summoned as a witness by the authority of the United States Senate;

II. That the Defendant was duly summoned to appear and to give testimony on July 31, 1958 before the Senate Select Committee; and,

III. That the Defendant wilfully failed and refused to appear and to give testimony on July 31, 1958, before the Senate Select Committee.

An analysis of the proofs elicited by the Government in its case-in-chief inexorably leads to the conclusion that

the Lower Court erred in denying the Defendant's Motion for a Judgment of Acquittal, for while there was substantial evidence, when considered, as it necessarily must be, in a light most favorable to the Government (*Coronado v. United States,* 266 F. 2d 719 (C. C. A. 5); *Johnson v. United States,* 265 F. 2d 496 (C. C. A. 4); *United States v. Horton,* 180 F. 2d 427 (C. C. A. 7); *Kowalchuk v. United States,* 176 F. 2d 873 (C. C. A. 6); *Yoffe v. United States,* 153 F. 2d 570 (C. C. A. 1); *United States v. Fielding,* 148 F. Supp. 46 (D. C. D. C.)), to establish beyond a reasonable doubt both elements I and III of the offense charged, it not only did not establish beyond a reasonable doubt, element II, but, on the contrary, it affirmatively negated that the subpoena which was served upon the Defendant required him to appear and to testify on July 31, 1958, before the Senate Select Committee.

At 10:42 a.m. of the morning of July 28, 1958, a subpoena was served upon the Defendant in the City of Detroit, Michigan (J. A. 11). This subpoena (Govt. Exhibit #5, J. A. 123) did *not* call for the Defendant's appearance before the Senate Select Committee on July 31, 1958, but rather his presence was commanded "forthwith".

A. AS A MATTER OF LAW, THE "FORTHWITH" SUBPOENA WAS A COMMAND TO THE DEFENDANT TO APPEAR AND TO TESTIFY BEFORE THE SENATE SELECT COMMITTEE NO LATER THAN JULY 29, 1958.

As recognized by the Lower Court (J. A. 39, 40, 67, 115), the "forthwith" provision of the subpoena served upon the Defendant during the morning of July 28, 1958 (J. A. 11), should have resulted in the Defendant boarding the first train destined from Detroit, Michigan to Washington,

D. C. In other words, when the distance between Detroit, Michigan and Washington, D. C. and the time which would ordinarily be required in traveling by train from the former to the latter city are judicially noticed by this Honorable Court, as it may properly do (*Cervantes v. United States*, 263 F. 2d 800 (C. C. A. 9); *Campbell v. United States*, 221 F. 186 (C. C. A. 9), *Ex parte Lair*, 177 F. 789 (D. C. Kansas); *Rutherford v. United States*, 264 F. 2d 180 (C. C. A. 9)), the "forthwith" provision of the subpoena was, in legal contemplation, tantamount to a command that the Defendant appear and testify before the Senate Select Committee, sitting in Washington, D. C., on July 29, 1958. While the term "forthwith" is somewhat chameleon-like in nature in that it displays a tendency to assume different connotations in different contexts,[14] the meaning ascribed to it by *Black's Law Dictionary* (4th Ed. 1957)[15] and the definition of it is approved by this Honorable Court in the case of *Dickerman v. Northern Trust Company*, 20 S. Ct. 311, 176 U. S. 181[16] unquestionably lends support to

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[14] In construing the term "forthwith" in a variety of situations, various State Courts have equated it, *inter alia*, to "immediate"; "without delay"; "at once"; "promptly"; "directly"; "with all convenient speed and dispatch"; "as soon as possible"; "as soon as may be done by reasonable exertion, confined to the object to be accomplished"; "with reasonable promptness, having due regard to the nature of its use and the circumstances of the case" (See cases annotated in Words and Phrases (Permanent Edition 1958), Vol. 17, pages 605 to 632).

[15] *Black's Law Dictionary*, *supra*, at page 782, defines "forthwith" as follows: "As soon as, by reasonable exertion, confined to the object, a thing may be done. Thus, when a defendant is ordered to plead forthwith, he must plead within twenty-four hours. When a statute enacts that an act is to be done 'forthwith', it means that the act is to be done within a reasonable time. (Citing cases.)"

[16] In *Dickerman v. Northern Trust Company*, *supra*, this Honorable Court, in construing the meaning of the term "forthwith" as con-

(Continued on next page)

the Defendant's contention that the subpoena in question (Govt. Exhibit #5, J. A. 123) required his presence to appear and testify before the Senate Select Committee no later than July 29, 1960.

B. THE EFFORTS OF MR. SALINGER TO MODIFY THE "FORTHWITH" REQUIREMENT OF THE SUBPOENA WERE A NULLITY.

As stated by the Assistant United States Attorney (J. A. 63, 64, 65), the Government proceeded upon the theory that the express provisions of the subpoena (Govt. Exhibit #5 (J. A. 123)), which had been served upon the Defendant on July 28, 1958 (J. A. 11), were subsequently modified by the oral instructions tendered to Mr. Joseph Louisell by Mr. Pierre Salinger, an investigator for the Senate Select Committee, and by a certain telegram (Govt. Exhibit #6 (J. A. 124)) sent by Mr. Salinger to the Defendant's home (J. A. 20, 21, 22, 24, 25, 26, 31, 32, 33, 51, 93, 95). Such a theory was not only not adopted by the Lower Court (J. A. 39, 40, 60, 64, 65), but is legally untenable for three cogent reasons:

(Continued from preceding page)

tained in a mortgage, observed at 20 S. Ct. 315, as follows: "It is insisted that the company was entitled to a reasonable time in analogy to certain cases which hold that in insurance companies the word 'forthwith' carries this significance. But 'forthwith' is defined by Bouvier as indicating that 'as soon as by reasonable exertion, confined to the object it may be accomplished. This is the import of the term; it varies, of course, with every particular case.' In matters of practice and pleading it is usually construed, and sometimes defined by rule of Court, as within twenty-four hours. Anderson (Law Dict.) says of the word that it 'has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done.'"

1. There were, at the close of the Government's case-in-chief, no proofs adduced which tended to establish that Mr. Louisell was either acting in the capacity of the Defendant's attorney in connection with the Defendant's appearance before the Senate Select Committee or that Mr. Louisell had agreed to inform and/or did inform the Defendant that the Senate Select Committee required the Defendant's presence before it to testify on July 31, 1958 (J. A. 9-56).

2. There were, at the close of the Government's case-in-chief, no proofs adduced which tended to establish that the Defendant either received Government Exhibit #6 or that he had knowledge of its contents (J. A. 9-56).

3. In any event and as an overriding legal consideration, the terms of a subpoena, which is process for the purpose of compelling the attendance of a person whom it is desired to use as a witness (97 C. J. S., Witnesses §20) cannot, with legal efficacy, be altered or modified by oral instructions or by other extrinsic means, (*In re Moore*, 325 Mich. 429; 39 N. W. 2d 27); any other conclusion, it is respectfully submitted, would inevitably result in the breakdown of the conduct of judicial and quasi-judicial proceedings and ultimately lead to chaos.

C. TIME BEING OF THE ESSENCE OF THE OFFENSE CHARGED, THE DEFENDANT CANNOT PROPERLY BE FOUND GUILTY OF FAILING TO APPEAR AND TO TESTIFY BEFORE THE SENATE SELECT COMMITTEE ON JULY 31, 1958, WHEN THE PROOFS EMANATING FROM THE GOVERNMENT'S WITNESSES ESTABLISHED BEYOND PERADVENTURE THAT HE WAS NEVER SUBPOENAED TO APPEAR AND TESTIFY ON JULY 31, 1958.

It is axiomatic that "A Defendant in a criminal case is entitled to know what he is charged with; and he is entitled to be tried on the charges brought against him." (*Epstein v. United States*, 174 F. 2d 754 (C. C. A. 6)). In fact, the source of the Defendant's right "to be informed of the nature and cause of the accusation" is the Sixth Amendment to the United States Constitution and Defendant respectfully submits that in view of the posture of the evidence of record, the instant conviction cannot be affirmed without doing violence to the provisions of the Supreme Law of the Land.

While it is generally true that insofar as time is concerned a divergence between the allegations of the indictment and the proofs will not constitute a fatal variance, it is nonetheless equally certain that where, as here, time is of the essence or is the gist of the offense, a variance between the time laid in the indictment and that established by the proofs is fatal to the prosecution (*Wharton's Criminal Law and Procedure* (Permanent Edition 1957) Vol. IV, §1775, Vol. V, §2062; *Underhill's Criminal Evidence* (5th Edition 1956) Vol. I, §87, *42 C. J. S., Indictments and Information*, §257, *27 Am. Jur., Indictments and Information* §181).

Patently, the gravamen of the offense proscribed by 2 U. S. C. §192, R. S. 102 (52 Stat. 942), as amended, is not an unjustifiable disregard of the authority of Congress in the abstract, but rather, the unlawful failure of the witness, who has been summoned, to appear and to testify before Congress or before one of its committees at the very place and at the very time specified. Here, the indictment specifically alleged that the Defendant's default occurred on July 31, 1958 (J. A. 3). However, the Government's proofs show that the default of the Defendant, if any, did not and could not have occurred on July 31, 1958, for the obvious reason, as has been discussed, *supra*, that the express terms of the subpoena (Govt. Exhibit #5, J. A. 123), the alleged noncompliance with which is the very "heart" of the charge against the Defendant, did not require the Defendant to appear and to testify before the Senate Select Committee at any time subsequent to July 29, 1958. Expressed somewhat differently, the Government, having deemed it advisable to charge the Defendant with a particular offense and then having failed during the proceedings in the Lower Court to introduce an iota of evidence tending to establish the Defendant's guilt of the offense charged, should not now be heard to say, in support of the conviction, that evidence which, at best, had a tendency to establish the guilt of the accused as to a separate and distinct offense with which the Defendant was not charged, was probative of the one offense with which the Defendant was in fact charged (*Reiner v. United States*, 92 F. 2d 823 (C. C. A. 9)).

D. WHERE THE UNCONTROVERTED EVIDENCE ADDUCED BY THE GOVERNMENT ESTABLISHED THAT THE ONLY SUBPOENA SERVED UPON THE DEFENDANT REQUIRED HIM TO APPEAR BEFORE THE SENATE SELECT COMMITTEE ON JULY 29, 1958, WHEN THE SENATE SELECT COMMITTEE WAS NOT EVEN IN SESSION, AND NOT, AS ALLEGED IN THE INDICTMENT, ON JULY 31, 1958, THE FAILURE OF THE GOVERNMENT TO PROVE THE OFFENSE CHARGED NECESSITATES A REVERSAL OF THE CONVICTION NOTWITHSTANDING THE PROVISIONS OF RULE 52(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

With commendable frankness and fairness, the Assistant United States Attorney represented to the Lower Court, during a colloquy pertaining to the Motion for a Judgment of Acquittal, that if the express terms of the subpoena (Govt. Exhibit #5, J. A. 123) were not or could not legally be altered or modified by the oral instructions given and/or the telegram sent by Mr. Salinger, the Trial Court had no alternative but to acquit the Defendant (J. A. 64).[17] No other result is dictated by the provisions of *Rule 52(a) of the Federal Rules of Criminal Procedure.*

The impact of §269 of the Judicial Code, as amended, (28 U. S. C. 391), (the substance of which was subsequently adopted as *Rule 52(a) of the Federal Rules of Criminal Procedure* (*Kotteakas v. United States*, 66 S. Ct. 1239, 328 U. S. 750)) upon the "law of variance" was stated as fol-

[17] In denying the Motion for Judgment of Acquittal, the Lower Court, by adopting a theory which frankly is beyond the comprehension of counsel for the Defendant, concluded that there was no variance between the indictment and proofs (J. A. 61, 65, 66, 67, 68, 115) and then observed that in any event Rule 52(a) of the Federal Rules of Criminal Procedure was authority for the proposition that the variance, if any, was not fatal (J. A. 40, 69).

lows in the case of *Berger v. United States*, 55 S. Ct. 629, 295 U. S. 78, at 55 S. Ct. 630:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. (Citing cases.)"

That the variance herein involved did not constitute a harmless error, but rather affected the substantial rights of the Defendant, is readily apparent when one notes that had the Defendant (in conformity with the proofs) been charged with failure to appear and to testify on July 29, 1958, he would have then been in a position to successfully assert a defense of which he was wholly deprived under the allegations as they appeared in the indictment, *the defense being that he could not be legally convicted of failing to appear and to testify before the Senate Select Committee on July 29, 1958 in view of the undisputed proof that on said date the Senate Select Committee was not in session* (J. A. 50).

Furthermore, assuming, *arguendo*, that the Defendant herein was not taken by "surprise", there is no doubt but that the second prerequisite to the invocation of the so-called "harmless error" doctrine, namely, protection against another prosecution for the same acts, is conspicuous by its absence. While the Defendant, were he in the future to be indicted and tried upon the charge of

wilfully failing to appear and testify before the Senate Select Committee on July 31, 1958, could questionably assert with success the defense of double jeopardy, such would not be the case if in the future the Government, as concededly it might with propriety do, should elect to indict and try the Defendant upon the charge of wilfully failing to appear and to testify before the Senate Select Committee on July 29, 1958.

ARGUMENT

III.

THE LOWER COURT ERRED WHEN, OVER THE TIMELY OBJECTION OF DEFENSE COUNSEL, IT ALLOWED THE ASSISTANT UNITED STATES ATTORNEY TO PURSUE, UPON CROSS-EXAMINATION OF A DEFENSE WITNESS, A LINE OF QUESTIONING WHICH MANIFESTLY PREJUDICED AND INFLAMED THE JURY AGAINST THE DEFENDANT.

In order that this Honorable Court might be in a position to comprehend the gross impropriety of a line of questioning pursued by the Assistant United States Attorney in the course of his cross-examination of defense witness Joseph Louisell,[18] not only the objected to questions and the answers thereto (both of which are italicized), but also the questions and answers thereto immediately preceding the objected to questions are hereinafter set out verbatim:

"Q. How long have you known Mr. Licavoli?

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[18] For a synopsis of Joseph Louisell's direct testimony bearing upon the defense of reliance upon advice of counsel, see Argument I, *supra*.

A. I've known Mr. Licavoli approximately ten, twelve years.

Q. How many times have you represented him?

A. I think I have represented him two or three times.

Q. You were representing him in another matter at the time of the service of the subpoena on July 28, were you not?

A. I was.

Q. Did you represent him as far back as 1950 or 1951 in some other matter?

A. I did.

Mr. Shadyac: If Your Honor please, I would like to object to this line of questioning as irrelevant.

The Court: You can't object to a line of inquiry.

Mr. Shadyac: To this particular question about 1950 or 1951.

The Court: Well, the question has been answered. You should note your objection before the witness answers.

Q. (By Mr. Hitz): *Did you represent him in connection with his appearance before another Congressional Committee some years ago?*

Mr. Shadyac: Objection, Your Honor.

The Court: How is that relevant, Mr. Hitz?

Mr. Hitz: I think it shows what Mr. Salinger evidently believed to be the case, namely, that Mr. Louisell was the agent—

The Court: I will overrule the objection.

Q. (By Mr. Hitz): Do you have in mind the question, sir?

A. *Yes, I do; and the answer is yes, in part, in association with another attorney by the name of P. J. M. Hally, spelled H-a-l-l-y, who is now deceased.*

Q. Was that in 1950 or 1951?

A. I'd have to refresh my recollection. I am not sure.

Q. Was it in the early '50's?

A. In the early '50's is correct.

Q. *As a matter of fact, would that be in connection with a Congressional committee appearance by Mr. Licavoli?*

Mr. Shadyac: Again, Your Honor, I would like to object to that particular question.

The Court: Objection overruled. I think it is important. I think that it is important to know why Mr. Salinger got in touch with the witness, and that is the only reason that I am admitting this question.

Mr. Shadyac: If Your Honor please, that is outside the scope of the direct examination.

The Court: No, no; this is not outside the scope of the direct examination. I think it is within the scope, because this witness testified concerning his conversatons with Mr. Salinger; so anything that bears on those conversations is proper.

The objection is overruled.

Q. (By Mr. Hitz): Do you have in mind the question, Mr. Louisell?

A. *Yes, I do; and the answer is yes.*

Q. Now, when you talked to Mr. Salinger on the telephone about 1:00 p. m. on July 29, 1958, Mr. Salinger was not unknown to you, was he?

A. He was not.

Q. As a matter of fact, you had talked to him on other occasions in Washington, D. C., in connection with this committee's matters, had you not?

A. I had.

Q. On more than one occasion?

A. Yes.

Q. About how many occasions?

A. I would say probably two or three.

Q. On those occasions, did you have business as an attorney for other persons appearing before that committee?

Mr. Shadyac: Objection, Your Honor.

The Court: Objection overruled.

A. I did.

Q. *Do you recall whether or not on one of those occasions Mr. Salinger asked you what prospective*

witnesses, naming them perhaps by a designation of racketeers, you represented, which persons he stated were likely to be called before the committee?

Mr. Shadyac: Objection, Your Honor, again.

The Court: Objection overruled.

A. *I don't recall that.* (J. A. 86-88.)"[19]

While it is well recognized that where testimony is admissible for a legitimate purpose the mere fact that it might tend to prejudice the Defendant is no ground for its exclusion (*Luteran v. United States*, 93 F. 2d 395 (C. C. A. 8), *Travis v. United States*, 269 F. 2d 928 (C. C. A. 10)), it is likewise a well-recognized rule (*Blumberg v. United States*, 222 F. 2d 496 (C. C. A. 5); *Scott v. United States*, 263 F. 2d 398 (C. C. A. 5); *United States v. Tomaiolo*, 249 F. 2d 683 (C. C. A. 2); *Frank v. United States*, 262 F. 2d 695, 104 U. S. App. 384), that if the evidence, on one hand, has little, if any probative value, but, on the other hand, is of such a nature as to likely inflame the jury against the Defendant, its admission constitutes reversible error.

Difficult, if not impossible, to perceive is how the fact that Mr. Louiseil had represented the Defendant almost ten years ago in any proceeding was relevant or germane to any of the issues involved in the trial of this matter, and this is particularly so if, as Defendant asserts (See

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[19] The Court of Appeals, without any citation of authority and without any discussion as to how these questions could be either relevant or material to any issue at bar or could in any way reflect upon the credibility of the witness, brushed aside, in a brief paragraph (see Appendix A to this Petition for Writ of Certiorari, Opinion of Court of Appeals, page 51) the contention made before the Court of Appeals and here reiterated that said questions were intended to and did in fact prejudice the Defendant by their insinuation, *inter alia*, that the Defendant was a "racketeer" who had previously been called to testify before the so-called "Kefauver" Committee (cf. *United States v. Gross*, 276 F. 2d 816 (C. C. A. 2)).

Argument II, *supra*), the oral instructions given by Mr. Salinger to Mr. Louisell could not, as a matter of law, have altered or modified the express terms of the subpoena served upon the Defendant (Government Exhibit #5, J. A. 123). Even more remote, if such is possible, was the fact that Mr. Louisell has represented third parties before the Senate Select Committee. Nonetheless, the Assistant United States Attorney, over the timely and persistent objections of defense counsel (J. A. 86-88), was given *carte blanche* by the Lower Court to elicit information of this nature from defense witness Louisell.

The prejudicial effect of the questions propounded by the Assistant United States Attorney is so self-evident as to scarcely require a lengthy discussion. In addition, the pattern of the questioning was such that little imagination is required to appreciate that its actual effect was, in fact, coincident with its intended effect.

Having established that Mr. Louisell had known the Defendant for from ten to twelve years and had since 1950 or 1951 represented him two or three times (information which, in itself, was totally irrelevant, albeit hardly prejudicial to the Defendant), the Assistant United States Attorney then proceeded to demonstrate that one instance of representation was in connection with the Defendant's appearance before another Congressional Committee in the early 1950's. Patently, the obvious inference, if not the only inference, which the jury might draw from this revelation was that the Defendant had appeared before the much publicized Kefauver Committee (Special Committee to Investigate Organized Crime in Interstate Commerce) in the early '50's and thus was an unsavory "police character." But there was more to come. Having established that Mr. Louisell had represented other persons before the Senate

Select Committee (again, information which in itself was totally irrelevant), the Assistant United States Attorney then administered the coup de grace by inquiring if these other persons had been designated as "racketeers" by Mr. Salinger. Certainly, if after it had become known to the jurors that the Defendant had previously appeared before a Congressional committee, there remained any doubt in their minds as to whether the Defendant was disreputable, this doubt must have necessarily been resolved adversely to the Defendant when the Assistant United States Attorney posed a question, the innuendo of which was that the Defendant likewise was a "racketeer."

Where, as here, the Government attempted by insinuation and innuendo to blacken the Defendant, the Court, in reversing the conviction, stated in *United States v. Tomaiolo, supra,* at 249 F. 2d 690:

> "In summary, by receiving this mass of inadmissible, irrelevant and highly prejudicial testimony, the District Court permitted the prosecution to paint the defendant Tomaiolo as a bad man, associating with criminal companions, who would do most anything. The accumulation of these errors made it impossible for the jury to limit its consideration to the charges for which Tomaiolo was being tried, and, in sum, they constitute reversible error."

It is respectfully submitted that the tactics of the Assistant United States Attorney, as above outlined, denied to the Defendant his right to a fair trial and that accordingly the findings of guilty must be reversed, for, as was stated in *Wilson v. United States,* 250 F. 2d 312 (C. C. A. 9), "An accused must not only be guilty of the offense of which he is charged and convicted, but, he must be tried and convicted according to proper legal procedures and standards."

PRAYER

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to the Circuit Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

IVAN E. BARRIS,
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Detroit 26, Michigan,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15764

Peter Licavoli, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION

Decided February 16, 1961.

Mr. Joseph W. Louisell, of the bar of the Supreme Court of Michigan, *pro hac vice*, by special leave of court, for appellant. Mr. Joseph H. Lesh was on the brief for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Mr. Oliver Gasch, United States Attorney, and Mr. Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before Prettyman, Danaher and Bastian, Circuit Judges.

Prettyman, Circuit Judge: Appellant was indicted, tried by jury, and convicted of failing and refusing to appear before the Senate Select Committee of Improper Activities in the Labor or Management Field, after having

been subpoenaed to appear. His principal point here is that the trial judge erred in refusing to instruct the jury that if the accused acted upon the advice of counsel they should acquit; indeed the judge instructed to the contrary.

Appellant says the offense with which he was charged,[1] wilfully making default, includes as an element a specific intent, *i.e.*, wilfulness. The statute says "wilfully makes default". Therefore, he says, good faith reliance upon advice of counsel is a defense. He does not say so, but an essential part of his premise is that an evil motive, which can be negatived by bona fide advice of counsel, is an element of "wilfully" under this statute.

It has been established ever since the *Sinclair* case[2] that reliance upon advice of counsel is no defense to a charge of failing to answer a pertinent question, an offense under another clause of this same statute.[3] But appellant points out that the statute does not mention wilfulness in the clause respecting failure to answer questions, whereas it notably and expressly uses "wilfully" in describing the offense of making default. Therefore, he argues, there is a critical difference between the two offenses and, while reliance on

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[1] A violation of 2 U.S.C. §192, 52 Stat. 942 (1938).

[2] Sinclair v. United States, 279 U.S. 263 (1929), cited with approval in Watkins v. United States, 354 U.S. 178, 208 (1957).

[3] The entire section is: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

counsel may not be a defense to the charge of which wilfulness is not an element, it is a defense when an offense with a specific intent (*i. e.*, wilfulness) is charged.

It was established by the *Bryan*[4] and *Fleischman*[5] cases that he who deliberately and intentionally fails to respond to a subpoena "wilfully makes default".[6] Evil motive is not a necessary ingredient of wilfulness under this clause of the statute. A deliberate intention not to appear is sufficient. It was established by the *Quinn* case[7] that a deliberate, intentional refusal is an element of the offense of refusing to answer a pertinent question under the other clause of the statute. We discussed this in *United States v. Deutch*.[8] So it is established that the intent essential to constitute an offense under these two clauses is the same in nature—a deliberate, intentional failure, without more, in each case.

Appellant argues to the contrary that a critical difference must be accorded the presence of the word "wilfully" in the one clause and its absence from the other. This fact, he argues, demonstrates an intention on the part of the Congress to make a difference. But we cannot ascribe such an intention from the presence and omission of the word. As we pointed out in the *Chapman* case[9] and again in the

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[4] United States v. Bryan, 339 U.S. 323 (1950).

[5] United States v. Fleischman, 339 U.S. 349 (1950).

[6] Our opinion in Fields v. United States, 82 U.S. App. D.C. 354, 164 F.2d 97 (1947), *cert. denied*, 332 U.S. 851 (1948), was to the same effect.

[7] Quinn v. United States, 349 U.S. 155 (1955).

[8] Chapman v. United States, 8 App. D.C. 302, 316-319 (1896), *cert. denied*, 166 U.S. 721 (1897).

[9] 98 U.S. App. D.C. 356, 235 F.2d 853 (1956).

Deutch case, a refusal to answer—the witness having appeared, being present and conscious of what is going on, understanding the question, and being advised of its pertinency to the inquiry—is obviously in and of itself a wilful act. But a failure to respond to a subpoena might be due to many causes other than deliberate intention, *e. g.*, illness, travel trouble, misunderstanding, etc. So "wilfully" was a necessary adverb in defining defaults which are subject to penalties, but that modifying word was unnecessary as a matter of legal definition in respect to refusals to answer questions. Our reasoning and conclusion upon this point are similar to our opinion in the *Deutch* case in regard to the necessity of including the word "wilfully" in an indictment for refusal to answer a question.

Appellant relies upon *United States v. Murdock*,[10] which he says stresses the difference between the two clauses of the statute evidenced by the presence of "wilfully" in only one of them. But the opinion in *Murdock* emphasized that the content of "wilfully" depends upon context.[11] There the statute was a section of the Internal Revenue Act, and the Court held that in that context it meant with a bad purpose. There can be no doubt that the *Bryan* and *Fleischman* cases, *supra*, held that in the statute involved in the case at bar "wilfully" means merely a deliberate intention: an evil motive is not a necessary part of the intent thus required. *Murdock* has no application here.

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[10] 290 U.S. 389 (1933).

[11] The same rule has been emphasized in later cases—*e.g.*, Browder v. United States, 312 U.S. 335, 340 (1941); Spies v. United States, 317 U.S. 492, 497 (1943); Hartzel v. United States, 322 U.S. 680, 686 (1944); Screws v. United States, 325 U.S. 91, 100 (1945)—in the Supreme Court and in many other federal court cases, as a Shepardizing of the *Murdock* decision will readily show.

Since, as we have remarked, it has been established since the *Sinclair* case, *supra*, that reliance upon advice of counsel is no defense to a charge of refusing to answer a question, such reliance is not a defense to a charge of failure to respond. The elements of intent are the same in both cases. All that is needed in either event is a deliberate intention to do the act. Advice of counsel does not immunize that simple intention. It might immunize if evil motive or purpose were an element of the offense. But such motive or purpose is not an element of either of these offenses. We are of opinion that the doctrine laid down in *Sinclair* applies also to a charge of wilfully making default. Advice of counsel cannot immunize a deliberate, intentional failure to appear pursuant to a lawful subpoena lawfully served.

In the case at bar there can be no serious dispute about the deliberate intention of Licavoli not to appear before the Committee pursuant to its subpoena. That he meant to stay away was made abundantly clear. That he did so upon the advice of a lawyer is no defense. The trial judge correctly instructed the jury.

Appellant also says that the trial judge erred in permitting the prosecutor to ask certain questions in his cross-examination of a lawyer who was a defense witness. The witness had testified about conversations with a representative of the Committee. The intent and effect of the disputed questions by the prosecutor on cross-examination were to show that the witness knew the representative and was familiar with the Committee and its processes. The trial judge thought the questions permissible, and we agree.

We find no error, and the judgment of the District Court will be

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT
September Term, 1960

No. 15764

Peter Licavoli, Appellant
v.
United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

Criminal 951-59

Before: Prettyman, Danaher and Bastian, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Prettyman.

Dated: February 16, 1961.